

STATE OF MICHIGAN
IN THE SUPREME COURT

DAVID M. MICK,

Plaintiff-Appellant,^{ee}

v

LAKE ORION COMMUNITY SCHOOLS,
ROBERT BASS, RICHARD KAST, CRAIG A.
YOUNKMAN, GLORIA ROSSI, CHRISTINE
LEHMAN and DAVID BEITER,

Defendants-Appellees.^{ants}

UNPUBLISHED

June 3, 2004

No. 241121

Oakland Circuit Court

LC No. 00-027577-NZ

G. Schaefer

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DAVID M. MICK,

Plaintiff-Appellant,^{ee}

v

ROBERT M. BASS and RICHARD KAST,

Defendants-Appellees.^{ants}

No. 241122

Oakland Circuit Court

LC No. 01-033085-NZ

APPLICATION FOR LEAVE TO APPEAL

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TABLE OF CONTENTS

	<u>Page</u>
INDEX TO AUTHORITIES.....	i
STATEMENT IDENTIFYING COMPLAINED-OF OPINION AND SETTING FORTH REQUESTED RELIEF.....	iv
QUESTIONS PRESENTED FOR REVIEW	v
STATEMENT OF MATERIAL PROCEEDINGS AND FACTS	1
A. Nature Of The Action.	1
B. Mick's Employment With The Lake Orion School District And His Efforts To Obtain An Administrative Position.	1
1. Elementary And Middle School Administrative Positions.....	1
2. Mick's Claims Of Discrimination Generally.....	3
3. Denial Of Administrative Positions Complained Of By Mick But Outside Of The Statute Of Limitations.....	4
a. 1991 Blanche Sims Elementary Principal.....	4
b. Waldon Middle School Assistant Principal.	4
c. 1995 Pine Tree Elementary Principal.	4
d. 1996 Blanche Sims Elementary Principal.....	5
e. 1996 Webber Elementary Principal.	6
f. Mick's Actions In The Fall Of 1996.....	6
g. 1997 Orion Oaks Elementary Assistant Principal.	7
4. Denial of Positions Complained Of By Mich Within Three Years Of Filing The Complaint.....	8
a. 1998 Orion Oaks Elementary Principal.	8
b. Mick's Formal Charge Of Discrimination.....	9
c. 1999 Stadium Drive Elementary Principal.	9
d. 2000 Pine Tree Elementary Principal.	10
5. Mick's Resignation As School Improvement Chair For Webber Elementary And Removal As Curriculum Committee Chair.	10
6. Demographics Of Elementary And Middle School Principals.	10
C. The Character Of Pleadings And Proceedings.....	11
1. The Trial Court Proceedings.....	11

2. The Court Of Appeals' Decision.....	14
INTRODUCTION	19
ARGUMENT I.....	21
MICK'S CLAIM FOR REVERSE GENDER DISCRIMINATION FOR THE DENIAL OF POSITIONS AFTER NOVEMBER 21, 1997 WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).	21
A. Standard Of Review.....	21
B. Mick Failed To Raise A Genuine Issue of Material Fact With Respect To His Reverse Gender Discrimination Claims.	22
ARGUMENT II	30
MICK'S CLAIM FOR RETALIATION WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).	30
A. Standard Of Review.....	30
B. Mick Failed To Raise A Genuine Issue Of Material Fact Regarding His Retaliation Claim.	30
RELIEF	37

INDEX TO AUTHORITIES

Page

MICHIGAN CASES

<i>Barrett v Kirtland Community College,</i> 245 Mich App 306, 628 NW2d 63 (2001).....	31, 38
<i>Cloverleaf Car Co v Phillips Petroleum Co,</i> 213 Mich App 186 (1995).....	37
<i>DeFlaviis v Lord & Taylor, Inc,</i> 223 Mich App 432, 566 NW2d 661 (1997).....	31, 32
<i>Feick v County of Monroe,</i> 229 Mich App 335; 582 NW2d 207 (1998).....	37
<i>Harrison v Olde Financial Corp,</i> 225 Mich App 601, 572 NW2d 679 (1997).....	22
<i>Harts v Farmers Ins Exchange,</i> 461 Mich 1, 597 NW2d 47 (1999).....	21
<i>Jager v Nationwide Truck,</i> 252 Mich App 464 (2002).....	14
<i>Lind v City of Battle Creek,</i> ____ Mich ____ (Docket No. 122054; 6/11/04).....	24
<i>Maiden v Rozwood,</i> 461 Mich 109; 597 NW2d 817 (1999).....	21, 22
<i>McCart v J. Walter Thompson,</i> 437 Mich 109; 469 NW2d 284 (1991).....	22
<i>Meek v Michigan Bell Telephone Co,</i> 193 Mich App 340 (1991).....	15
<i>Meyer v Centerline,</i> 242 Mich App 560, 619 NW2d 182 (2000).....	31, 32, 33, 34
<i>Quinto v Cross & Peters Co,</i> 451 Mich 358; 547 NW2d 314 (1996).....	22
<i>Smith v Globe Life Ins Co,</i> 460 Mich 446; 597 NW2d 28 (1999).....	22
<i>Sumner v Goodyear Tire & Rubber,</i> 427 Mich 505 (1991)	15

<i>Towne v Michigan Bell Telephone Co,</i> 455 Mich 688, 568 NW2d 64 (1997).....	23
<i>West v General Motors Corp,</i> 469 Mich 177, 665 NW2d 468 (2003).....	36
<i>Wilcoxon v Minnesota Mining and Mfg Co,</i> 235 Mich App 347 (1999).....	33

OUT-OF-STATE CASES

<i>Cox v Electronic Data Systems Corp,</i> 751 F Supp 680 (ED Mich, 1990).....	35
<i>Dobbs-Weinstein v Vanderbilt University,</i> 185 F3d 542 (CA 6, 1999)	32
<i>Hoffman v Rubin,</i> 193 F3d 959 (CA 8, 1999)	32
<i>Jacklyn v Schering-Plough Health Care Products Sales Corp,</i> 176 F3d 921 (CA 6, 1999)	35
<i>McDonnell-Douglas Corp v Green</i> 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973).....	19, 23, 24, 38
<i>Polk v Yellow Freight System, Inc,</i> 801 F2d 190 (CA 6, 1986)	35
<i>Williams v Bristol-Myers Squibb Co,</i> 85 F3d 270 (CA 7, 1996)	33

COURT RULES

MCR 2.116(C)(10).....	12, 16, 21, 22
MCR 2.116(G)(5)	21
MCR 7.302(A)(1)(a)	iv
MCR 7.302(B)	19

STATUTES

Elliott-Larsen Civil Rights Act	1, 11, 14, 17, 23, 31, 34, 35, 38
MCL 37.2202(1)(a).....	24

MCL 37.2701(a)	31
MCL 600.5805(8)	13

CONSTITUTIONAL PROVISIONS

R Aldisert, <i>Logic for Lawyers</i> , 9-1 to 9-6 (1992)	28
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**STATEMENT IDENTIFYING COMPLAINED-OF
OPINION AND SETTING FORTH REQUESTED RELIEF**

Pursuant to MCR 7.302(A)(1)(a), defendants-appellants Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter, all of whom shall hereinafter collectively be referred to as defendants, state that the within application for leave to appeal seeks the Court's review of the Court of Appeals' June 3, 2004 opinion reversing in part the Oakland County Circuit Court's March 25, 2000 order granting defendants' motion for summary disposition. Defendants seek a peremptory reversal of the Court of Appeals' ruling reversing the trial court's grant of summary disposition to defendants and, failing that, a grant of their application for leave to appeal.

QUESTIONS PRESENTED FOR REVIEW

I.

WHERE PLAINTIFF FAILED TO ESTABLISH A PRIMA FACIE CASE OF REVERSE DISCRIMINATION EITHER THROUGH THE USE OF DIRECT EVIDENCE OR THROUGH RESORT TO THE *McDONNELL-DOUGLAS* METHODOLOGY, DOES THE COURT PROPERLY PEREMPTORILY REVERSE THE COURT OF APPEALS' DECISION OR GRANT DEFENDANTS LEAVE TO APPEAL?

Defendants-Appellants Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman , Gloria Rossi, Christine Lehman, and David Beiter say "Yes".

Plaintiff-Appellee says "No".

II.

IN THE FACE OF PLAINTIFF'S FAILURE TO DEMONSTRATE THE EXISTENCE OF A GENUINE ISSUE OF FACT CONCERNING TWO OF THE ELEMENTS OF A PRIMA FACIE CASE OF RETALIATION, I.E., AN ADVERSE EMPLOYMENT ACTION AND CAUSATION, DOES THE COURT PROPERLY PEREMPTORILY REVERSE THE COURT OF APPEALS' DECISION OR GRANT DEFENDANTS LEAVE TO APPEAL?

Defendants-Appellants Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman , Gloria Rossi, Christine Lehman, and David Beiter say "Yes".

Plaintiff-Appellee says "No".

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

A. Nature Of The Action.

David M. Mick (Mick) filed suit against Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter on November 21, 2000. (Plaintiff's Complaint, Oakland County Circuit Court No. 00-027577-NZ). The summons expired on February 20, 2001. Because he failed to serve Bass and Kast on or before February 20, 2001, Mick brought a separate action against them on July 6, 2001. (Plaintiff's Complaint, Oakland County Circuit Court No. 01-033085-NZ). The two cases were then consolidated. (Order, 8/20/01).

In both complaints, Mick asserted two counts: a claim of reverse gender discrimination under the Elliott-Larsen Civil Rights Act (Count I) and a claim of retaliation (Count II). The trial court granted defendants' motion for summary disposition (Order 3/25/02) and denied Mick's motion for reconsideration. (Opinion and Order 4/11/02). In an opinion dated June 3, 2004, the Court of Appeals affirmed the trial court's decision in part and reversed in part.

B. Mick's Employment With The Lake Orion School District And His Efforts To Obtain An Administrative Position.

1. Elementary And Middle School Administrative Positions.

With the exception of a single two-year hiatus, Mick has been a teacher with the Lake Orion Community Schools since 1974. Mick's allegations revolved around claims that Mick was denied administrative positions as principal or assistant principal during the 1991 to 1999 tenure of former Superintendent Robert Bass on the basis of reverse sex discrimination and/or retaliation. The Lake Orion Community Schools filled many elementary and middle school administrative positions from 1991 to the present. (Exhibit A, Defendants' Motion for Summary

Disposition).¹ During that time period, the Lake Orion Community Schools employed males as principals at both the elementary and middle school levels. In fact, the School District hired nine men to serve as elementary or middle school principals or assistants during the pertinent time:

Year	Name	Position
1991	David Beiter	Sims Elementary Principal
1991	David Beiter	Waldon Middle School Principal
1995	Derek Fries	Middle School Assistant Principal
1995	David Beiter	Scripps Middle School Principal
1996	Don Hammond	Middle School Assistant Principal
1998	Burt Quinn	Orion Oaks Administrative Assistant
1999	Jesse Baker	Stadium Drive Elementary Principal
1999	Kenneth Gutman	Scripps Middle School Principal
2000	Eric Whitney	Orion Oaks Administrative Assistant
2001	Eric Whitney	Sims Elementary Principal
2001	Brian Kaplan	Orion Oaks Administrative Assistant
2001	Dan Haas	Middle School Assistant Principal

This list does not include administrators hired at the secondary or high school level, many of whom were also male.

Mick was interviewed for numerous positions, both inside and outside the school district. He was never the successful candidate. During this same 1990 to 2001 time frame, the District hired eleven female principals or assistants.

¹Many of Lake Orion Community Schools' administrative records were destroyed by fire in February 1997. This list was compiled by Christine Lehman, Assistant Superintendent for Human Resources, with assistance from many. See Affidavit of Christine Lehman. (Exhibit B, Defendants' Motion for Summary Disposition).

2. Mick's Claims Of Discrimination Generally.

On or about July 1, 1998, Mick filed a charge of discrimination with the EEOC. (Mick Dep, Exhibit 13; Defendants' Motion for Summary Disposition). There, Mick complained that he had been "passed over for five Elementary Principalships, most recently on July 1, 1998." (*Id.*) In July of 1999, soon after Dr. Younkman started as superintendent of the Lake Orion Community Schools, Mick met with him and provided a "Chronology" outlining Mick's allegations of discrimination. (Mick Dep, Exhibit 4; Defendants' Motion for Summary Disposition). In this document, Mick complained that he was wrongfully denied seven principal and two assistant positions. (Exhibit A, Defendants' Motion for Summary Disposition).²

No one ever told Mick that he was not hired for a position because he is male:

Q In all of those meetings that you had with Kast and Bass and Mabery and any other representatives of Lake Orion Schools, did anyone ever tell you or suggest to you that you were not hired because you were a male?

A No. No one told me that.
[Mick Dep, 48; Defendants' Motion for Summary Disposition]

In fact, Mick admitted that, prior to his charge of discrimination in July of 1998, he had not made any complaints of discrimination to any administrator. (Mick Dep, pp 86, 99; Defendant's Motion for Summary Disposition). But, Mick recalled a meeting with one member of the Board of Education in the Fall of 1996, during which Mick was asked the reason he was not hired. (Mick Dep, pp 81-82; Defendants' Motion for Summary Disposition). Mick said that he "didn't really know" why he had not been hired. (Mick Dep, p 81). When asked if he could see a

²Although Mick claimed he was discriminated against on the basis of sex in not being awarded the principal position at Blanche Sims Elementary in 1991, another male candidate won the position. Mick had forgotten that David Beiter was awarded the principal position at Blanche Sims in 1991, prior to being transferred to take over as principal at Waldon Middle School (Mick Dep, pp 32-35; Defendants' Motion for Summary Disposition).

pattern, Mick said “[W]ell, it seems that females were being hired for these positions, this was quite apparent.” (*Id.*)

3. Denial Of Administrative Positions Complained Of By Mick But Outside Of The Statute Of Limitations.

a. 1991 Blanche Sims Elementary Principal.

In the Summer of 1991, following a lengthy hiring process, the School District selected David Beiter as the principal of Sims Elementary. Mick had been interviewed for the position. After a period of approximately one month, Beiter was transferred to serve as principal at Waldon Middle School in order to fill a vacancy there. At that point, Superintendent Robert Bass appointed Dr. Janet Burns as principal at Sims Elementary. Dr. Burns had prior experience working as an elementary principal and was a Ph.D.

b. Waldon Middle School Assistant Principal.

Prior to leaving the School District in 1991, Boutin was allowed to hire an assistant principal for Waldon Middle School. Principals generally have significant influence in the selection of assistant principals. Following an interview process, Boutin recommended Ms. Seppanen as the assistant principal for Waldon Middle School. (Affidavit of Lehman, ¶¶ 5-6, Exhibit B; Defendants’ Motion for Summary Disposition).

c. 1995 Pine Tree Elementary Principal.

In the Spring of 1995, a principal vacancy occurred at Pine Tree Elementary. Superintendent Bass chaired a committee to fill the position. The committee was comprised of teachers from the school, parents from the school, and other administrators. (Affidavit of Lehman, ¶7, Exhibit D; Defendants’ Motion for Summary Dispositions). Following the interview process, Beverly Tepper emerged as the successful candidate. The committee was almost unanimous in making Tepper its first choice for the position. Tepper had worked as a

teacher in the Walled Lake Schools and was a participant in an internship program that was designed to train new principals. In addition, she had a master's degree in Educational Leadership from Eastern Michigan University. (Exhibit D, Tepper Resume; Defendants' Motion for Summary Disposition).

Although Mick was interviewed for the position, he did poorly in the interview. He was not considered a strong candidate by the committee. According to Bass, Mick came across as stiff and excessively nervous at the interview. (Exhibit C, Bass Deposition, pp 57-58).

Following his unsuccessful candidacy, Mick approached Bass for feedback. Bass encouraged Mick to continue to apply in other school districts if Mick wanted to advance into administration. Bass based his comments upon Mick's poor performance during his interview. In Bass' opinion, Mick simply did not have the interpersonal skills necessary to be an outstanding principal at Lake Orion. (Bass Dep, Exhibit C, pp 57-58).

d. 1996 Blanche Sims Elementary Principal.

In the Spring of 1996, a principal vacancy opened at Sims Elementary. Assistant Superintendent Dick Kast chaired a committee to fill the position. The committee was comprised of teachers from the school, parents from the school, and other administrators. Following the interviews, the Committee members were asked to rank order their top three candidates. Kast ranked Mick as his top candidate. However, Kast was the only interviewer to so rank Mick. The consensus of the committee was that Diane Benjamin was the best available candidate for the position. (Kast Dep, Exhibit E, pp 38-44; Defendants' Motion for Summary Disposition). Benjamin had a master's degree in reading from Northern Michigan University. In addition, she had worked as an elementary school principal for six years prior to being hired by

Lake Orion Community Schools. (Benjamin Dep, Exhibit F, pp 8-11; Defendants' Motion for Summary Disposition).

e. 1996 Webber Elementary Principal.

In the Spring of 1996, a principal vacancy also occurred at Webber Elementary. Kast again chaired a committee to fill the position. As before, the committee consisted of teachers from the school, parents from the school, and other administrators. After discussions with staff members from Webber Elementary who were on the hiring committee, Kast decided not to interview Mick. In addition, the outgoing principal did not support Mick's candidacy. Kast, who had rated Mick highly when Mick interviewed for the Webber Elementary job, believed that the worst thing for Mick at that time would be to interview at Webber and to lose the job. Kast thought that interviewing Mick for the Webber position would not be in Mick's best interests since the staff had already indicated that they were not interested in him. (Kast Dep, Exhibit E, pp 44-47).

Gloria Rossi was the successful candidate for the position. Ms. Rossi had a master's degree in education from Wayne State University. In addition, prior to being hired by Lake Orion Community Schools, Rossi had worked as an elementary principal for six years at Lapeer Community Schools. (Rossi Dep, Exhibit H, pp 10-11; 37-38).

f. Mick's Actions In The Fall Of 1996.

In the Fall of 1996, the School District filled the assistant principal position at Waldon Middle School. A male, Don Hammond, was hired for the job. Because he did not have the support of Principal Alice Seppanen, Mick was not interviewed for the assistant principal position at Waldon Middle School.

In October of 1996, Mick complained to Kast about not being interviewed for the positions at Webber Elementary and Waldon Middle School. Kast explained that Mick was not interviewed at Webber Elementary because he did not have the support of the Webber staff. On the other hand, Mick was not interviewed at Waldon Middle School because he lacked the support of the building principal. (Kast Dep, Exhibit E, pp 44-47; 56). Mick responded by circulating petitions to demonstrate support among Webber staff members. (Mick Dep, Exhibit 9).

As Mick circulated the petitions, Webber Principal Gloria Rossi, Association President Roma Wood, and Assistant Superintendent Kast received complaints from other teachers. Those were to the effect that Mick was applying undue pressure on other staff members to sign his petitions. Following a meeting requested by Roma Wood, Rossi directed Mick to discontinue circulating the petitions in school during the school day.

On November 15, 1996, Mick submitted to Kast three petitions signed by Webber staff members along with a cover letter. (Mick Dep, Exhibit 9). In his cover letter, Mick stated, "The person(s) who told you or other members of the selection committee that they talked to the Webber staff and parents were misrepresenting who they talked to." In making this assertion, Mick was, in effect, calling Kast a liar since Kast had himself talked to the Webber staff members on the selection committee and had been informed that they were not interested in interviewing David Mick. (Kast Dep, Exhibit E, pp 44-47). In short, Mick made a bad situation worse by confronting other staff members at Webber and by implying that Kast was lying.

g. 1997 Orion Oaks Elementary Assistant Principal.

Orion Oaks Elementary opened in the Fall of 1996. It was a "magnet school" applying a multi-age education concept. The teachers at Orion Oaks Elementary were selected from

applicants within the school district. Mick, however, did not attend the school district meetings leading to the formation of Orion Oaks Elementary, and he did not apply to teach there. The first principal of Orion Oaks Elementary was Christine Lehman, now assistant superintendent. Lehman had previously been a teacher, an assistant principal at the High School, and an elementary principal at Carpenter Elementary. (Affidavit of Lehman, ¶¶ 9-13, Exhibit B).

In the Summer of 1997, the school district determined to hire an assistant for Orion Oaks Elementary. The position paid \$55,000. This amount was approximately \$10,000 less per year than Mick's salary. (Mick Dep, pp 94-95). Although Mick applied for the position, he was not selected, in part, because he had not previously demonstrated any interest in the Orion Oaks program.

Melanie Olds O'Neil was the successful candidate for the Orion Oaks administrative assistant position. In contrast to Mick, O'Neil had participated in meetings leading to the formation of Orion Oaks school. She had applied for and been hired to teach at Orion Oaks. She had emerged as a leader on the staff during the 1996-97 school year. (Affidavit of Lehman, ¶¶ 11-13, Exhibit B).

4. Denial of Positions Complained Of By Mich Within Three Years Of Filing The Complaint.

a. 1998 Orion Oaks Elementary Principal.

In the Summer of 1998, Superintendent Bass appointed Lehman to serve as an administrative intern in the central office. Lehman had expressed an interest in pursuing a central office administrative position in Lake Orion or in another district and she was given an opportunity to train for career advancement in the central office. (Affidavit of Lehman; Exhibit B). Lehman's appointment to an administrative intern position left vacant the principal position at Orion Oaks. Bass appointed O'Neil to fill the position. O'Neill had served the school as

assistant principal during the 1997-98 school year. As of the time she started as principal, O'Neil had earned a master's degree from Michigan State University. (Affidavit of Lehman; Exhibit B; Bass Dep, Exhibit C, pp 48-52).

b. Mick's Formal Charge Of Discrimination.

On July 1, 1998, the same day as Melanie Olds O'Neil's appointment to the principal position at Orion Oaks Elementary, Mick filed a charge of discrimination with the EEOC. (Mick Dep, Exhibit 13). There, he complained that he has been "passed over for five Elementary Principalships, most recently on July 1, 1998." Although he did not specify the positions in his charge, Mick challenged the decisions made about the principal posts at Sims Elementary in 1991, at Pine Tree Elementary in 1995, at Sims Elementary and Webber Elementary in 1996, and at Orion Oaks Elementary in 1998.

Prior to his July 1, 1998 EEOC charge, Mick had never raised a claim of discrimination with any administrator at the Lake Orion Community Schools. Although Mick had expressed disappointment and had requested feedback, he had never asserted that he was denied positions due to reverse sex discrimination. In addition, while he had apparently discussed his concerns with one individual Board of Education member, Mick never made any complaint to the School District prior to his EEOC filing. (Mick Dep, pp 81-82, 86, 99).

c. 1999 Stadium Drive Elementary Principal.

In 1999, Jim Theunick, the long time principal of Stadium Drive Elementary, retired. Lehman oversaw the committee process for the selection of a new principal. Because he did not have administrative experience, Mick was not interviewed. The committee chose Jesse Baker, a male, as the new principal for Stadium Drive Elementary. (Affidavit of Lehman, ¶14, Exhibit B).

d. 2000 Pine Tree Elementary Principal.

In 2000, Bev Tepper transferred to the principal position at the new Paint Creek Elementary School. This created a vacancy in the principal position at Pine Tree. Lehman oversaw a committee process at Pine Tree. Again, the committee consisted of Lehman, a principal, teachers, parents, community members, and a student. The committee interviewed Mick. Following the interviews, the committee selected Diane Dunaskiss as the new principal. Dunaskiss has her master's degree in special education from Oakland University. Among her other accomplishments, Dunaskiss had also been elected to the Wayne State University Board of Governors. (Affidavit of Lehman, ¶15, Exhibit B).

5. Mick's Resignation As School Improvement Chair For Webber Elementary And Removal As Curriculum Committee Chair.

Mick asserted that he was retaliated against by being removed from the membership of two committees, the School Improvement Committee at Webber Elementary in early 1999 and the Curriculum Committee in October of 2000 (Mick Dep, Exhibits 19-27). Assistant Superintendent for curriculum and instruction Beiter removed Mick from this latter position. His reasons for doing so were discussed in an October 20, 2000 memo to Mick (Mick Dep, Exhibit B, Exhibit 33) and in Beiter's deposition testimony. (Beiter Dep, Exhibit I, pp 82-91). Beiter replaced Mick because roughly ten different people had expressed their lack of confidence in Mick's leadership. (Beiter Dep, Exhibit I, p 84). In addition, Beiter felt that Mick was not doing an adequate job on aligning standards for the department and other events. (*Id.*, pp 81-89).

6. Demographics Of Elementary And Middle School Principals.

As of October, 2002, when defendants filed their brief on appeal with the Court of Appeals, there were 1,414 elementary school principal members of the Michigan Elementary and Middle School Principals Association ("MEMSPA"). 807 were female and 607 were male.

Shortly after World War II, elementary principals were eighty percent male and only twenty percent female. Since that time, there has been a steady increase in the percentage of female elementary principals. At the middle school level, there were 149 MEMSPA members. Ninety-seven were male and fifty-two were female. The Executive Director of MEMSPA, Joanne Welihan, opined that because elementary teaching staffs are predominately female and there are more qualified female candidates as a result, more women are becoming principals at the elementary level statewide. (Affidavit of Joanne Welihan, Exhibit J).

C. The Character Of Pleadings And Proceedings.

1. The Trial Court Proceedings

Mick commenced this action on November 21, 2000. Due to the expiration of the summons as to defendants Bass and Kast, Mick brought a second suit against them, and the matters were consolidated. Both complaints contained two counts. Those were for gender discrimination under the Elliott-Larsen Civil Rights Act (Count I) and retaliation for filing a charge of discrimination (Count II).

Generally, Mick complained that he repeatedly applied for elementary school principal positions but that he was not hired. (Complaint, Oakland County Circuit Court No. 01-033085-NZ, ¶¶ 5-11; Complaint, Oakland County Circuit Court No. 00-027577-NZ, ¶¶ 10-16). More specifically, Mick asserted that he was fully qualified for the positions he sought but that he was not hired because defendants discriminated against him on the basis of his gender. (Complaint, Count I, ¶¶ 28-33; Complaint, Count I, ¶¶ 39-44). Mick also charged that, after he filed a complaint with the EEOC, defendants retaliated against him by denying him employment opportunities which he should have achieved. (Complaint, Count II, ¶¶ 34-37; Complaint, Count II, ¶¶ 45-48).

Defendants filed an answer to both complaints, the thrust of which was to deny any liability to Mick. (Answer of Defendants Robert Bass and Richard Kast to Plaintiff's Complaint, Oakland County Circuit Court No. 01-033085-NZ, 7/26/01; Answer to Defendants Lake Orion Community Schools, Craig A. Younkman, Gloria Rossi, Christine Lehman, & David Beiter, Only, 12/21/00). Defendants also raised various affirmative defenses, including the failure to state a claim upon which relief could be granted and the expiration of the applicable statutes of limitations. (*Id.*) After discovery, defendants sought summary disposition. (Defendants' Motion for Summary Disposition, 12/13/01). They maintained that Mick's claims relating to the denial of positions prior to November 25, 1997, (or July 6, 1998, for Bass and Kast) were time-barred by the applicable three-year statute of limitations. (Defendants' Motion for Summary Disposition, 2).³ Defendants also contended that Mick's reverse gender discrimination and retaliation claims were properly subject to dismissal pursuant to MCR 2.116(C)(10). (*Id.*) Defendants supported their motion with a series of exhibits (Exhibits A through L) and with the deposition of Mick including Exhibits 1 through 33. Defendants furnished additional exhibits (Exhibits K through T) in connection with their reply brief.⁴ After several rounds of briefing, the trial court heard oral arguments on February 13, 2002. (Tr, Motion Hearing, 2/13/02, pp 2-18).

Doing so, the trial court observed that, although Mick raised the continuing violation doctrine in his sur-reply, he failed to address the statute of limitations issue in his response. (Tr,

³The applicable statutes of limitation extended back for differing time periods. All defendants, with the exception of Bass and Kast, were sued in the original action. Thus, the claims as to them extended back to November 21, 1997. Bass and Kast were brought into the litigation by virtue of a second complaint, and the claims against them were barred if they occurred prior to July 6, 1998.

⁴For the Court's east of reference, Exhibits A through T are included in defendants' appendix using the same lettering. Defendants have supplied the exhibits to Mick's deposition as Exhibit Q.

Motion Hearing, 2/13/02, p 10). The trial court also concluded in each case that Mick's claims were properly confined to conduct within the three-year period preceding the filing of each complaint. (Tr, Motion Hearing, 2/13/02, p 11). The trial court predicated its ruling on a review of the documentation submitted by the parties, on the fact that Mick failed to give the defendants notice until he filed an EEOC claim in 1998, and on the effect of the applicable statute of limitations, MCL 600.5805(8). (Tr, Motion Hearing, 2/13/02, pp 10-11).

With respect to Mick's gender discrimination claim, the trial court set forth the elements of such discrimination. (Tr, 2/13/02, pp 11-12). It then concluded that Mick could not establish a prima facie case. Responding to Mick's argument that he satisfied a listing of the qualifications for an elementary school principal, the trial court observed that those were mere rudimentary qualifications and that in each instance a committee considered various qualifications and declined to promote Mick at the same time that the qualifications of the successful candidates were excellent. (Tr, Motion Hearing, 2/13/02, p 13). The trial court also noted that Mick had applied for administrative positions in thirty other school districts but had only obtained interviews in seven districts and was not selected for any of the positions. (Tr, Motion Hearing, 2/13/02, p 14). After considering the evidence, the trial court held that Mick could not proceed with his reverse discrimination claim:

[I]n reviewing it all and taking it in the light according to the law I read when we began this opinion in connection with the matter, I just do not see in any fashion where the plaintiff has proven in any way, according to the standard established by the various cases, that he wasn't promoted because he was a male. [Tr, Motion Hearing, 2/13/02, pp 14-15]

The trial court further noted that it "just isn't there, based on the affidavits and based on the material submitted." (Tr, Motion Hearing, 2/13/02, p 15).

The trial court then considered Mick's retaliation claim and reviewed the elements of a prima facie case of retaliation. (Tr, Motion Hearing, 2/13/02, pp 15-16). The trial court was not satisfied that a fact question existed. (Tr, Motion Hearing, 2/13/02, pp 17-18). As a result, it granted the motion to dismiss Mike's retaliation count as well. (*Id.*)

Mick timely sought rehearing. The trial court denied the motion. In the trial court's view, Mick presented the same issues in his motion for rehearing as the trial court had originally ruled upon. (Opinion and Order, 4/11/02.)

2. The Court Of Appeals' Decision

In a split decision dated June 3, 2004, the Court of Appeals' majority affirmed in part and reversed in part the trial court's summary disposition rulings. In particular, the Court of Appeals' majority reversed the dismissal of certain gender discrimination claims against the Lake Orion Community Schools and reversed in part the dismissal of Mick's retaliation claims. Concerning the former, the Court of Appeals noted the decision in *Jager v Nationwide Truck*, 252 Mich App 464 (2002) to the effect that the Civil Rights Act's anti-discrimination provision forecloses individual liability and allows only for employer liability. Accordingly, the majority felt bound to affirm the dismissal of Mick's gender discrimination claims as against the individual defendants. The Court of Appeals also found that the period of limitations for the remaining gender discrimination claims was three years under MCL 600.5805(8), such that Mick was allowed to pursue his claims against Lake Orion Community Schools for events which occurred after November 21, 1997.⁵

⁵ More specifically, the Court of Appeals found that Mick fulfilled only two of the three prongs of the continuing violations theory [*Meek v Michigan Bell Telephone Co*, 193 Mich App 340, 343-344 (1991) and *Sumner v Goodyear Tire & Rubber*, 427 Mich 505, 528 (1991)] but did not satisfy the last prong of the test. Clearly, Mick had noticed that he was being discriminated against on July 1, 1998, the date he filed a gender discrimination charge with the EEOC.

Next, the Court of Appeals addressed the propriety of the trial court's dismissal of Mick's gender discrimination claims pursuant to MCR 2.116(C)(10). Doing so, the Court of Appeals' majority concluded that Mick presented evidence from which a reasonable factfinder could conclude that the Lake Orion Community Schools chose a woman who was less qualified than Mick for the Orion Oaks principal position. To the view of the Court of Appeals' majority, Mick presented evidence that, between 1991 and 1999, the overwhelming number of elementary administrator positions went to women within the Lake Orion Community Schools. Mick also demonstrated that the Orion Oaks' principal position was not open to the competitive process. For those reasons, the Court of Appeals' majority found that the trial court erred in dismissing Mick's gender discrimination claim against Lake Orion Community Schools relative to the Orion Oaks principal position.

Next, the Court of Appeals' majority affirmed the trial court's summary dismissal of Mick's gender discrimination claim under a disparate impact theory. Neither the language of the collective bargaining agreement nor the record submitted below supported Mick's argument on the disparate impact theory.

From there, the Court of Appeals' majority proceeded to assess the propriety of the trial court's dismissal of Mick's retaliation claim under MCR 2.116(C)(10). Doing so, the Court of Appeals remarked that defendants had not disputed that Mick established the first three prongs of a prima facie retaliation claim, to wit: that he engaged in protected activity, i.e., his filing of a discrimination charge with the EEOC and the filing of the instant lawsuit; that defendants knew of the activity; and that Mick was subject to an adverse employment action. However, the Court

However, Mick delayed filing his complaint for more than two years. Under those circumstances, the Court of Appeals ruled that the continuing violations theory did not apply.

of Appeals' majority disagreed with defendants' contention that Mick could not establish the requisite showing of causation and it permitted Mick to proceed with his claim for retaliation:

We conclude that Rossi's letter threatening plaintiff with disciplinary measures was circumstantial evidence of retaliation. Plaintiff had never before been disciplined in his twenty-five years of teaching, plaintiff presented evidence from which a reasonable factfinder could conclude that Rossi's letter was not founded in fact, and Rossi's reprimand letter was dated just days after the EEOC issued its February 5, 1999 determination finding merit in plaintiff's allegation that gender discrimination had played a role in the selection of the women chosen for the principal position at Orion Oaks in July, 1998. . . .

In reaching that result, the majority of the Court of Appeals rejected defendants' contention that the alleged retaliatory acts were too remote in time from the filing of Mick's claim with the EEOC in July, 1998, to make the requisite showing of causation. In fact, the Court of Appeals' majority observed that the EEOC issued its determination finding merit in Mick's claim on February 5, 1999, seven months after Mick filed the claim, and that Rossi's alleged conduct occurred on February 11, 1999. Therefore, the majority could not agree that the causation element was not established sufficiently to survive summary disposition.

As part of its opinion, the Court of Appeals' majority criticized the dissent's rejection of plaintiff's retaliation claim against Rossi on the basis that an employer's act which does not permanently affect an employee's economic or employment status does not constitute an adverse act for purposes of establishing retaliation under the Civil Rights Act. The majority expressed its unawareness of any such permanency requirement. It took the position that an adverse employment action need only be materially adverse. Stated otherwise, the majority believed that a reasonable factfinder could conclude that it was more than mere inconvenience or an alteration of job responsibility for Mick's performance to be criticized for the first time in his 23 years of employment with the School District when Rossi referred to Mick as "deceptive and insubordinate" and threatened more severe action.

Writing in dissent, Judge Bill Schuette called for an affirmance of the trial court's dismissal of Mick's claims for retaliation and for employment discrimination. As for Mick's retaliation theory, Judge Schuette opined that Mick failed to establish the requisite element of causation:

After a review of the record, I conclude that plaintiff failed to establish the fourth element, causation, because the alleged acts were too remote from the filing of the EEOC claim. See *Cox v Electronic Data Systems Corp*, 751 F Supp 680, 695 (ED Mich, 1990) (the plaintiff failed to establish causation regarding her retaliatory discharge claim and she was discharged two months after she filed the discrimination complaint). Here, plaintiff filed the EEOC claim in July, 1998, plaintiff did not apply for another position as principal in defendant's school district until 1999, after at least six months had passed. Similarly, plaintiff was not removed as chairman of the district-level social studies curriculum committee until October, 2000, approximately two years after he filed the EEOC claim. Even if I were to conclude that the loss of the chairman position of the school improvement committee constituted an adverse act, an interim period of at least one year passed between the time he filed the EEOC claim and the time that he resigned in 1999 . . .

The dissent offered an additional reason for its conclusion. It found that the acts complained of by Mick did not constitute adverse acts for the purpose of a retaliation claim. That was because the complained-of activity did not permanently affect Mick's economic status or employment status.

Similarly, the dissent disagreed that defendants discriminated against Mick on the basis of his gender. The crux of Mick's claim for discrimination was an assertion that defendants were obligated to abide by the terms of the collective bargaining agreement and that, because defendants took complete subjective control over the hiring process involving violation of the union contract, males, and, particularly Mick, were excluded from the elementary school principal positions. Judge Schuette said that defendants presented testimony of one of the union negotiators that the collective bargaining agreement did not apply to administrators. Further, Mick had provided the trial court with only two pages of union contract. As substantiation for its

conclusion, the dissent noted that, during the relevant time, twelve females had been appointed to principal positions and that at least nine males had been appointed to twelve principal positions in elementary and middle schools. For the reasons discussed, the dissent called for a ruling affirming the trial court's conclusion that Mick failed to establish that defendants acted with discriminatory animus towards Mick on the basis of his gender.

Defendants now seek leave to appeal the Court of Appeals' unfavorable rulings reversing the trial court's summary disposition order.

INTRODUCTION

MCR 7.302(B) states the grounds upon which the Court may grant leave to appeal. The instant appeal satisfies a number of those. For example, the Court properly grants leave to appeal because this case presents an issue of major significance to the jurisprudence of the State. That issue pertains to the proper utilization of the *McDonnell-Douglas* analysis in the confines of a reverse discrimination suit. The bench and bar alike would benefit from the Court's full discussion and elaboration of the burden of proof properly resting upon a plaintiff in a reverse discrimination suit.⁶

So, too, a grant of leave to appeal would afford the Court an opportunity to reiterate the appropriate role of a court in weighing claims of discrimination which infringe upon employers' business decisions. Business decisions lie beyond the realm of the courts. Courts must not be permitted to second-guess management. It is critical that Michigan employers retain a wide range of discretion in setting job standards and requirements and in holding the rights to decide whether employees meet those standards. An employment discrimination suit is not a vehicle for judicial review of business decisions. This Court properly confirms and reiterates that point.

In addition, based upon an examination of the governing law, the Court readily concludes that the Court of Appeals' decision is clearly erroneous and will cause material injustice and conflicts with decisions of this Court or of the Court of Appeals. For example, a gender discrimination claim is not properly predicated upon a factual situation where another male was awarded the job. Likewise, a gender discrimination claim does not arise in those circumstances where the person ultimately filling the job position was more qualified than Mick. Case law

⁶ The reference is *McDonnell-Douglas Corp v Green*, 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973).

authority necessarily recognizes the right and ability of a business owner to award the job to the most qualified person.

What this case appears to boil down to is a personality dispute between Mick and his supervisory personnel. That does not constitute the stuff of which an actionable case of gender discrimination or retaliation is made. Mick's personal feelings about alleged mistreatment cannot and do not elevate his case to one capable of withstanding a motion for summary disposition.

ARGUMENT I

MICK’S CLAIM FOR REVERSE GENDER DISCRIMINATION FOR THE DENIAL OF POSITIONS AFTER NOVEMBER 21, 1997 WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).

A. Standard Of Review.

An appellate court reviews *de novo* a trial court’s decision regarding a motion for summary disposition. *Spiek v Dep’t of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). *Harts v Farmers Ins Exchange*, 461 Mich 1, 51, 597 NW2d 47 (1999); and *Smith v Globe Life Ins Co*, 450 Mich 446, 454; 597 NW2d 28 (1999). In *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999), the Court articulated the standard of review for summary disposition motions brought under MCR 2.116(C)(10). The *Maiden* court explained that a motion under MCR 2.116(C)(10) tests the factual sufficiency of a complaint. In evaluating a motion for summary disposition brought under that subsection, a trial court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue regarding any material fact, the moving party is entitled to judgment as a matter of law.

Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, that party may not rely on mere allegations or denials in the pleadings but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J. Walter Thompson*, 437 Mich 109, 115; 469 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Smith v Globe Life Ins Co*, *supra*, at pp 454-455, quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). “A litigant ’s mere pledge to

establish an issue of fact at trial cannot survive summary disposition under MCR 2.116(C)(10),” *Maiden v Rozwood, supra*, at p 121. Instead, a litigant opposing a properly supported motion for summary disposition under MCR 2.116(C)(10) must present substantively admissible evidence which creates a genuine issue of material fact to the trial court prior to its decision on the motion. *Id.*

B. Mick Failed To Raise A Genuine Issue of Material Fact With Respect To His Reverse Gender Discrimination Claims.

A claim of reverse discrimination is a claim of intentional discrimination, *Harrison v Olde Financial Corp*, 225 Mich App 601, 572 NW2d 679 (1997). Intentional discrimination may be proved by alternative methods. Specifically, it may be established by direct or indirect evidence.

In some discrimination cases, there is direct evidence of racial bias. But, in most such cases, there is no direct evidence. Recognizing this fact, the United States Supreme Court in *McDonnell-Douglas Corp v Green*, 411 US 792, 36 L Ed 2d 668, 93 S Ct 1817 (1973) developed a framework for examining discrimination claims where direct evidence of racial bias is lacking. The *McDonnell-Douglas* analysis announces the standard to be used in determining whether a plaintiff has established a prima facie case of discrimination.

In *Towne v Michigan Bell Telephone Co*, 455 Mich 688, 568 NW2d 64 (1997), the Court adapted the *McDonnell-Douglas* framework to the Michigan Civil Rights Act. That was done to accommodate additional types of discrimination claims, including employment discrimination based on sex and age, and to accommodate other adverse employment actions, *Towne*, at 695. The framework has long been used by the Courts of this State. In sum, in applying the *McDonnell-Douglas* framework, a court recognizes that varying facts in discrimination cases require courts to tailor the *McDonnell-Douglas* framework to fit the particular situation at hand.

Strict application of the *McDonnell-Douglas* framework would preclude all reverse discrimination claims without direct evidence of discriminatory bias.

In its recent opinion in *Lind v City of Battle Creek*, ____ Mich ____ (Docket No. 122054; 6/11/04), the Court addressed the issue of whether a claim for “reverse discrimination” must, as some courts have held, satisfy standards different from those required for other claims of discrimination. Having heard oral argument, the Court concluded that MCL 37.2202(1)(a) provides that “[a]n employer shall not . . . discriminate against an individual with respect to employment . . . because of . . . race” and that MCL 37.2202(1)(a) draws no distinctions between “individual” plaintiffs on account of race. Accordingly, the Court rejected an approach requiring that, in order to make a prima facie showing, a plaintiff in a reverse discrimination case must, in addition to satisfying the obligations of “minority plaintiffs in discrimination cases, also present ‘background circumstances’ supporting the suspicion that the defendant is that unusual employer who discriminates against the majority . . .” In short, there is no heightened burden of proof on a plaintiff in the reverse discrimination suit. That leaves a plaintiff to prove that he is a member of a protected class, that he applied and was qualified for an available promotion; that despite his qualifications, he was not promoted; and that a female employee of similar qualifications was promoted. Upon this showing, a presumption of discriminating intent is established for possible rebuttal by the employer. Absent this showing, a reverse discrimination plaintiff who has no direct evidence of discriminatory intent cannot proceed. Contrary to the Court of Appeals’ conclusion, the trial court properly held that Mick failed to prove a prima facie claim for reverse discrimination. Under *McDonnell-Douglas*, Mick should not have survived summary disposition.

In Count I of his complaint, Mick generally asserted that he “was treated differently in his employment by all Defendants on the basis of his gender when compared to the treatment by Defendants of similarly situated females performing the same or similar work as Plaintiff” and that the different treatment was “intentional.” In addition, Mick claimed that the reasons given for the differing treatment were a pretext for discrimination. (Complaint, ¶¶ 41 through 43). In the general allegations of the complaint, Mick stated that he was denied a principal position on six occasions, even though on one occasion the position was awarded to a male candidate. (Complaint, ¶¶ 14-17). [Mick never specified the six principal positions referenced in the complaint.] He also complained about the denial of an assistant principal position at Orion Oaks Elementary School. (Complaint, ¶¶ 18-20).

Mick’s claim was properly summarily dismissed. Where the School District has hired nine different men to administrative positions at the elementary and middle school levels for which Mick was qualified and certified, Mick failed to show that defendants⁷ were predisposed to discriminate against men. Mick was repeatedly interviewed for administrative positions in Lake Orion. Numerous males were hired. Mick’s lack of success was not due to his sex. Mick pointed to no direct evidence of discrimination. He relied on Lehman’s testimony and some comments by Bass and Rossi. None of this testimony showed discrimination against Mick on the basis of his gender, either directly or circumstantially.

In any event, Mick omitted key testimony. For example, Lehman was asked about the plan she followed to help ensure that both male and female role models were represented in the school administration at all levels. She testified as follows:

Q And your statement to me a moment ago was that you try to get equal

⁷Four of the individual defendants are men, including both the current and former superintendents.

numbers meaning of male and females throughout the district so there is equal representation of male and female? Did I adequately paraphrase what you have testified to?

A Yes.

Q And I would like to know what method you employ as a person in charge of the hiring process to attempt to get equal numbers of men and women in the school district?

A You hire the best qualified person in the – for the job.

Q Okay. And how does that help you attempt to get equal numbers of males and females throughout the district in principal jobs?

A I said you try and get good role models. And if it equals out that is the case that is a positive for you. There is no plan. There is no scheme. There is nothing developed to do that.
[Lehman Dep, Exhibit M, pp 78-79]

In addition, Lehman pointed out that the Lake Orion Schools received more applications for elementary principal positions from qualified female candidates than from qualified male candidates.⁸ (Lehman Dep, p 78). Therefore, if one were seeking to ensure that equivalent numbers of males and females were hired at the elementary level, such action would operate to benefit males and not females. Stated differently, in the absence of action to ensure the hiring of equal numbers of males and females, one would expect to see more females hired than males at the elementary level for the reason that there are more qualified female applicants. This testimony did not give rise to an inference of discrimination.

In addition, Mick misused Lehman's notes regarding Gloria Rossi being nervous during an interview. Lehman's notes on an interview with Gloria Rossi stated, "Gloria must have been nervous" and "Gloria is much more positive than she appeared." (Exhibit 20). Mick asserted

⁸The Affidavit of Joanne Welihan of the Michigan Elementary and Middle School Principal Association demonstrates that Lake Orion's experience is consistent with trends statewide. (Exhibit J).

that Lehman was inconsistent because she was not more tolerant of Mick's nervousness in interviews. But these interview notes were from a 1999 interview for the Scripps Middle School Principal position,⁹ and Rossi did not get the job. In fact, the successful candidate for the position was a male, Kenneth Gutman.

Mick also asserted that Bass complained that Mick used his letter of recommendation (intended for external use only) internally, and, at the same time, allowed both Gloria Rossi and Diane Dunaskiss to have him as a reference. Bass felt that Mick misused his letter because Bass was still working in the system. But both Rossi and Dunaskiss used Bass as a reference after he retired.

Mick also argued that Bass, who retired in June of 1998, was predisposed to hiring female administrators. When Bass started as Superintendent of the Western School District in 1981, there were eight male administrators and no female administrators. When he left in 1990 to move to Lake Orion, there were six male administrators and two female principals. Two of the three elementary principals were female in 1990. This cannot be used to give rise to an inference of discrimination. The numbers Mick provided did not reveal the number of applicants, their qualifications, or anything at all that would allow a conclusion regarding Bass's conduct. Nor did Mick's hearsay testimony (and that of Jan Glebe) to the effect that Bass had a reputation for preferring female administrators in the buildings show discrimination. Perhaps farthest from the mark was Mick's contention that Bass must have preferred female principals, because he applied for a position with Playboy after he retired. This statement had no

⁹Exhibit N is the index for documents produced by defendants in this case. Plaintiff's Exhibit 20 is Bates stamped 23420. Exhibit N demonstrates that this document was part of the interview materials for the Scripps Middle School hiring process in 1999.

connection in law or logic to any fact material to Mick's claims in this lawsuit. See generally, R Aldisert, *Logic for Lawyers*, 9-1 to 9-6 (1992).

As with Bass, Mick made several efforts to attack Gloria Rossi. The relevance of those purported facts to Mick's discrimination claim was unclear. Mick pointed to Rossi's email stating "I am exercising my right to be a woman and change my mind." In the second email, Rossi stated, when her secretary was changing buildings, "I feel like the woman who's been left for a younger model." Neither statement evidenced an intent to discriminate against men on the basis of gender.

Mick also suggested that Rossi sought to get rid of other male staff members, namely, Mike Kulik and Howard Sanford. Director of Special Education, Tom Harwood, was involved in the decision-making regarding Kulik, a special education teacher. And Director of Buildings and Grounds, Lloyd English, was part of the decision-making regarding Howard Sanford, a custodian. Both Kulik and Sanford resigned. Sanford did so after he was directed to identify the source of a lead of confidential information and after a full opportunity to discuss his options with his union. Just prior to the meeting at which Sanford resigned, Rossi had received complaints that Sanford was sexually harassing and threatening co-workers and that he had threatened to turn down the school. The purpose of the meeting had been to discuss these complaints. Sanford resigned before the complaints were addressed. (See January 2, 2001 letter of Dr. Younkman, Exhibit O). This does not give rise to an inference of discrimination.

The Court of Appeals' majority permitted Mick to proceed with his reverse discrimination claim based upon the facts and circumstances concerning Mick's denial for the Orion Oaks administrator position in July, 1998. Doing so, the Court of Appeals totally missed

the critical point serving as the lynch pin for the decision by the Lake Orion Community Schools.

Orion Oaks Elementary School opened in the Fall of 1996. It was a “magnet school” applying a multi-age education concept. Various School District meetings leading to the formation of Orion Oaks Elementary in the Fall of 1996 took place. Mick did not attend any of those meetings. He did not apply to teach at Orion Oaks when the School opened in the Fall of 1996. While Mick did apply for the position of assistant at Orion Oaks, he was not selected because he had not previously demonstrated any interest in the Orion Oaks magnet school program.

Melanie Olds O’Neill was the successful candidate for the Orion Oaks administrative assistant position. Ms. O’Neill had participated in the meetings leading to the formation of the Orion Oaks School. She had applied for and been hired to teach at Orion Oaks when the School opened. She emerged as a leader on the staff during the 1996-1997 school year.

The principal position at Orion Oaks was left vacant in the Summer of 1998. Ms. O’Neill was appointed to fill the position. She had served the Orion Oaks School as its assistant principal during the 1997-1998 school year. When she started as principal, O’Neill held a master’s degree from Michigan State University. The Court of Appeals engaged in a mere comparison of the credentials between Mick and Ms. O’Neill. It overlooked the critical factor upon which the decision was made to appoint Ms. O’Neill to the position. She had a documented history of interest in and involvement with the Orion Oaks magnet school.

For the Court of Appeals to engage in a mere comparison of credentials is clear error. That would suggest that an employer may never deviate from an applicant’s resume in filling vacant positions. Non-resume qualifications are crucial. Any decision by the Court of Appeals

which suggests to the contrary is deserving of the Court's full review and defendants request that occur here.

ARGUMENT II

MICK'S CLAIM FOR RETALIATION WAS PROPERLY DISMISSED PURSUANT TO MCR 2.116(C)(10).

A. Standard Of Review.

The standard of review for this argument is the same as for Argument I.

B. Mick Failed To Raise A Genuine Issue Of Material Fact Regarding His Retaliation Claim.

The Civil Rights Act prohibits an employer from retaliating against an employee who has either opposed a violation of the Act or who has asserted rights under the Act, MCL 37.2701(a). A prima facie case for a retaliation is made upon the following showing: (1) that the plaintiff engaged in protected activity; (2) that this was known by the defendant; (3) that the defendant took an adverse employment action against the plaintiff; and (4) that there was a causal connection between the protected activity and the adverse employment action, *Barrett v Kirtland Community College*, 245 Mich App 306, 315-316, 628 NW2d 63 (2001), citing *Meyer v Centerline*, 242 Mich App 560, 568-569, 619 NW2d 182 (2000) and *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436, 566 NW2d 661 (1997). Thus, in order to meet the threshold element of a claim for retaliatory discharge, a plaintiff must demonstrate that he was engaged in protected activity. The second element necessary to a prima facie case of retaliation requires a plaintiff to demonstrate that the employer knew of the protected activity. Under the third element of a retaliation claim, a plaintiff must demonstrate an adverse employment action. Finally, the fourth element calls upon a plaintiff to show a causal connection between the adverse employment action and the protected activity, *DeFlaviis, supra*, at p 436.

Here, there was insufficient evidence for Mick to survive defendants' summary disposition motion as to at least two of the four prongs of a prima facie case for retaliation.¹⁰ Specifically, Mick was unable to prove that defendants took an adverse employment action. In addition, Mick failed to show any causal connection between his involvement in a protected activity and any alleged adverse employment action.

An adverse employment action occurs when an employee suffers some personal loss or harm with respect to a term, condition, or privilege of employment, *Hoffman v Rubin*, 193 F3d 959 (CA 8, 1999). When there is no change in rank, pay, or other benefits, an adverse employment action has not occurred (*id.*) Likewise, it has been said that an employment action must be final or lasting in order for it to constitute an adverse employment action, *Dobbs-Weinstein v Vanderbilt University*, 185 F3d 542 (CA 6, 1999).

As explained by the court in *Meyer v City of Centerline*, *supra*, an adverse employment action must be materially adverse. That is to say that it must be more than mere inconvenience or an alteration of job responsibilities. Accordingly, a plaintiff must have an objective basis rather than mere subjective impressions for demonstrating that the change is adverse, *Wilcoxon v Minnesota Mining and Mfg Co*, 235 Mich App 347 (1999). As the *Meyer* court explained, not every unpleasant matter short of discharge or demotion creates a cause of action for retaliatory discharge. For example, being shunned by one's co-workers or being treated with hostility is not an adverse employment action when one suffers no accompanying loss in title, salary, or benefits, *Meyer, supra*. Other than advancing her own subjective views on the subject, the *Wilcoxon* plaintiff failed to make any showing that her transfer to a new position was an adverse employment action. Although ceasing her involvement in governmental affairs affecting outdoor

¹⁰Mistakenly, the Court of Appeals' majority said that defendants only challenged the causation element of a prima facie case for retaliation.

advertising, the plaintiff was assuming responsibility for the company's public service activity nationwide. Under the circumstances, the court could hardly impute an adverse employment action to the defendant. Further, since the defendant had not stripped her of any of the accouterments of her former position, the plaintiff was unable to meet her burden of presenting evidence to show that the transfer was materially adverse.

Significantly, upon speaking to the type of conduct which constitutes an adverse employment action, the court in *Williams v Bristol-Myers Squibb Co*, 85 F3d 270 (CA 7, 1996), cautioned that, if the proper threshold were to be abandoned, every trivial personnel action that an irritable, chip-on-the-shoulder employee did not like could form the basis of a discrimination suit. Here, the evidence fails to establish that Mick was subjected to an adverse employment action during the relevant time of his employment at Lake Orion Community Schools. Defendants' behavior did not affect any diminution in Mick's title, salary, or benefits. There were no changes in Mick's duties or working conditions. Mick's complaints about incorrect paychecks that were later corrected and written disciplinary warnings that were later removed from his personnel file did not as a matter of law constitute an adverse employment action sufficient to support a claim for retaliation.

In addition, Rossi's February 11, 1999 memo concerning Mick's performance was not accompanied by any diminution in title, salary, or benefits. That brings Mick's case squarely within the holding of *Meyer v City of Centerline*, where the court explicitly stated that being shunned by one's co-workers or being treated with hostility is not an adverse employment action. One shudders to think of the ramifications of accepting a ruling that an employer's criticism of an employee are sufficient to constitute adverse employment action so as to give rise to an actual claim for retaliation. An employer must be at liberty to document an employee's shortcomings.

To suggest that steps taken by an employer to criticize and to document an employee's conduct amounts to actionable retaliation is to effectively remove from employers the right to monitor an employee's work conduct for fear that the employee will then turn around and bring a claim for retaliation under Michigan's Civil Rights Act. Therefore, Mick failed to make out a prima facie case of retaliation. And the trial court did not err in granting defendants' summary disposition motion.

So, too, Mick fell short in his attempts to prove the requisite causal relationship between his filing of an EEOC complaint and the conduct complained of by him. To establish the causation element of a prima facie case for retaliation, a plaintiff must show not just a causal link between participation in activity protected by the Civil Rights Act and the employer's alleged adverse employment action but also that it was a "significant factor", *Jacklyn v Schering-Plough Health Care Products Sales Corp*, 176 F3d 921, 929 (CA 6, 1999) and *Polk v Yellow Freight System, Inc*, 801 F2d 190, 199 (CA 6, 1986). Mick cited no evidence whatsoever to suggest that his filing of an EEOC complaint was a "significant factor" in Rossi's February 11, 1999 memo threatening Mick with disciplinary action.

It is said that the significant factor standard requires a showing of more than a causal link, *Cox v Electronic Data Systems Corp*, 751 F Supp 680 (ED Mich, 1990). That is because a factor can be a cause without being significant. However, only a significant factor suffices to show retaliatory conduct. All that Mick alleged was that his discharge occurred after he filed an EEOC complaint and that his supervisors knew about the complaint. Such allegations are insufficient, in and of themselves, to state a prima facie case for retaliation.

In addition, the lapse of time between Mick's filing of an EEOC complaint and the conduct he complains of weighs against any finding of retaliation. The undisputed evidence

shows that, well before the filing of Mick's EEOC complaint, Mick unsuccessfully applied for a number of positions. There were numerous reasons why Mick did not get the job. On occasion, it was due to Mick's lack of credentials and qualifications. Other times, it related to Mick's lack of administrative experience. Mick was also too nervous. Mick's failure to express an interest in the development of the "magnet school" led to his denial for other positions. Given those factors, Mick's filing of an EEOC complaint cannot be said to be a significant factor in any decision not to appoint him to a principal position. Further, Rossi did not send her memo to Mick until some seven months after Mick filed his EEOC complaint in July of 1998. Therefore, the memo could not properly serve as "circumstantial" evidence of retaliation.

Summary disposition for a defendant is appropriate when a plaintiff cannot factually demonstrate a causal link between a protected activity and an adverse employment action, *West v General Motors Corp*, 469 Mich 177, 184, 665 NW2d 468 (2003). In order to prevail, a plaintiff must show that his employer took the adverse employment action "because of" the plaintiff's protected activity and that the adverse employment action was "in some manner influenced by the protected activity . . ." Something more than a temporal connection between a protected activity and an adverse employment action is required to show causation where discrimination based upon retaliation is claimed, *id.* at 185. The *West* court analyzed the proofs necessary to establish a causal connection between protected activity and an adverse employment action. It concluded that a plaintiff must show something more than merely a coincidence in time between the protected activity and the adverse employment action.

In addition, the alleged retaliatory acts here were remote in time from the filing of plaintiff's EEOC complaint in July, 1998. Thus, they do not support a viable claim for retaliation. Rossi's memo to plaintiff was not sent until seven months later, on February 11,

1999. Further, once having filed the EEOC complaint in July, 1998, Mick did not apply for another principal position until 1999, after at least six months had passed. Further, Mick was not removed as chairman of the district level social studies curriculum committee until October of 2000. This timeline underscores Mick's failure to meet his burden of proving the requisite causal connection sufficient to withstand defendants' (C)(10) motion for summary disposition.

Evidence of a general nature that an employer is not pleased with the filing of a discrimination charge is not sufficient to establish the causation element. *See Feick v County of Monroe*, 229 Mich App 335; 582 NW2d 207 (1998) (Evidence that defendant had stated that he was "not pleased" with EEOC complaint and had talked to one other person regarding the complaint was "insufficient to establish a causal link between plaintiff's EEOC complaint and the adverse employment actions.") Yet, that is all that Mick showed here. Consequently, the Court of Appeals should have affirmed the trial court's summary dismissal of Mick's claim for retaliation.

To prove his case for retaliation, Mick pointed to the fact that he was disciplined for the first time in his career. But simply because one event follows another does not mean that the first caused the second. Drawing such an inference would be completely speculative. *Cloverleaf Car Co v Phillips Petroleum Co*, 213 Mich App 186, 192-193 (1995). Mick presents no basis for concluding that any of these events was in any way connected with his filing an EEOC charge. He simply announces that his having been "disciplined" amounted to adverse employment actions and then reasons that since these "items never occurred" before, they must be enough to "imply a causal relation between events." (Plaintiff/Appellant's Appeal Brief, p 37). They do not and the trial court correctly rejected this speculative claim. That ruling was correct.

The majority's opinion cannot be sustained. It represents an overly broad and improper reading of Michigan's Civil Rights Act. No doubt, Michigan courts have long held that the Civil Rights Act is remedial and is to be liberally construed to effectuate its ends. However, it is also a fundamental principle that a liberal construction of an act must nonetheless be a reasonable construction that best accomplishes its purpose, *Barrett, supra*. To paraphrase the *Barrett* court, interpretation of the civil rights act's prohibition of discrimination to encompass the factual situation set forth here "turns the civil rights act on its head".

More properly so, the Court of Appeals' majority should have called for an affirmance of the trial court's summary disposition ruling. Following upon the application of the traditional *McDonnell-Douglas* analysis, the Court of Appeals was bound to conclude that Mick lacked a viable claim for reverse discrimination. Mick did not and could not prove that his qualifications for the various principal positions equaled or exceeded those of the eventual appointee. Likewise, the Court of Appeals' majority erred in finding that Mick produced sufficient evidence to raise a genuine issue of material fact concerning two elements of a prima facie claim for retaliation, i.e., the involvement of an adverse employment action and the requisite causal connection. As a matter of law, Mick was unable to demonstrate the existence of a genuine issue of material fact sufficient to withstand defendants' summary disposition motion as to either Mick's claim for a reverse discrimination or for a retaliation.

RELIEF

Wherefore, defendants-appellees, Lake Orion Community Schools, Robert Bass, Richard Kast, Craig A. Younkman, Gloria Rossi, Christine Lehman, and David Beiter, respectfully request that the Court peremptorily affirm the Court of Appeals' June 3, 2004 opinion affirming the trial court's summary disposition order, peremptorily reverse those portions of the opinion reversing the trial court's summary disposition order, and, failing that, grant this application for leave to appeal.

Respectfully submitted,

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